

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALAN FETTEROLF,

Defendant-Appellant.

UNPUBLISHED

March 14, 2006

No. 258484

Grand Traverse Circuit Court

LC No. 03-009151-FH

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating a motor vehicle under the influence of drugs (OUIL) causing death, MCL 257.625(4), two counts of OUIL causing serious injury, MCL 257.625(5), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to 6 ½ to 15 years' imprisonment for the OUIL causing death conviction, 3 to 5 years' imprisonment for each of the OUIL causing serious injury convictions, 2 to 4 years' imprisonment for the cocaine possession conviction, and one year in prison for the possession of marijuana conviction. We affirm.

This case arises from an early morning automobile collision between a vehicle driven by defendant and a vehicle driven by Steven Hess, who died from his injuries, and occupied by three friends, two of whom were injured.

Defendant first asserts that the trial court abused its discretion when it permitted two of the prosecution's expert witnesses to answer improper hypothetical questions and to render opinions on subjects beyond their areas of expertise. We disagree.

One witness was qualified as an expert in toxicology and the other was an accident reconstructionist. The qualification of a witness as an expert and the admissibility of the witness's testimony are reviewed for an abuse of discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). An evidentiary error does not merit reversal in a criminal case "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (2000), quoting MCL 769.26. Defendant's challenge to the testimony of the accident reconstructionist is not preserved and thus is reviewed for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 702 provides as follows:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This Court has held that the admission of expert testimony requires that: (1) the witness is an expert; (2) there are facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) the knowledge is in a particular area which belongs more to an expert than to the common person. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

With regard to the prosecution's toxicology expert, defendant first asserts that the trial court abused its discretion when it permitted that expert to give his opinion regarding the potential effects of cocaine on defendant's driving and the likely impact of cocaine on the accident, and on the question whether either vehicle involved in the crash crossed out of their lane of travel and into the oncoming lanes of traffic. The record establishes that the witness, who holds a PhD in toxicology and had been the supervisor of the toxicology units of the Michigan State Police Crime Lab for 11 years, was qualified to give testimony about the potential effects of cocaine on defendant's driving and the likely impact of cocaine on the accident.

With regard to the question whether either vehicle involved in the accident crossed out of its lane, looking at the challenged testimony in context, it is clear that this witness was not, in fact, expressing an opinion on this point. Rather, he was reviewing the facts in evidence regarding how the accident appeared to have occurred, and was then expressing his opinion as to whether such facts were consistent with a person having cocaine in that person's body at the level defendant did at the time of the accident. Such an opinion is within his area of expertise as a toxicologist. Moreover, his testimony was based on facts already in evidence. Accordingly, the trial court did not abuse its discretion when it permitted the prosecution's toxicology expert to give the testimony defendant challenges here.

With regard to the prosecution's accident reconstruction expert, defendant asserts that the trial court abused its discretion when it permitted that witness to give his opinion regarding the effect of the decedent's blood alcohol level on the accident. However, when asked to give his opinion on this question, this witness stated that he was unable to give such an opinion. Moreover, looked at in context, rather than stating an opinion on this question, this witness instead testified simply that he had found no evidence to indicate that the decedent did anything improper that could have caused the accident. Accordingly, because this witness did not state an opinion on the issue of the effect of decedent's blood alcohol level, there was no reversible error.

Defendant also asserts that the trial court abused its discretion by permitting the prosecution's accident reconstruction expert to mix fact and expert opinion testimony. However, defendant fails to show that the jury was confused by the witness's dual role. Thus, defendant fails to establish error, plain or otherwise. In light of the weight of the evidence adduced,

defendant has also failed to show that an actually innocent man was convicted. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant next argues that the trial court abused its discretion when it permitted the prosecution to introduce into evidence closed containers of hard lemonade found inside defendant's vehicle following the accident. We agree. Defendant was not charged with driving under the influence of alcohol, or with any alcohol related offence. Further, the fact that defendant had a carton of closed containers of hard lemonade in his truck at the time of the accident has no tendency to make it more or less probable than it would be without this evidence that defendant was driving under the influence of cocaine and marijuana, or that defendant possessed cocaine and marijuana.

Nonetheless, defendant is not entitled to the reversal of his convictions on this ground. In addition to the hard lemonade, the prosecution also introduced into evidence a lab report indicating that defendant's blood alcohol level was zero following the accident. Moreover, three witnesses testified that defendant was tested at the hospital following the accident and found to have no alcohol in his system at that time. Under these circumstances, it does not affirmatively appear that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Defendant has also argued that that the trial court committed error mandating reversal when, after the jury had twice asked for the court to define the term "substantial cause," it failed to provide the requested supplemental instruction. However, we conclude that defendant waived this issue when he affirmatively agreed to receive the jury's verdict knowing that the jury had not yet been provided with an instruction the court was preparing when the jury reached its verdict. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter